SUPREME COURT, U. S

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1513

CON F. SHEA, individually and as Executive Director of the DEPARTMENT OF SOCIAL SERVICES, STATE OF COLORADO, CHARLINE J. BIRKINS, individually and as Director of the COLORADO STATE DIVISION OF PUBLIC WELFARE; KEITH D. McBURNEY, ERNEST J. BLOEDORN, MANUEL DIAZ, JOHN L. HALEY, JAMES A. HENDERSON, M.D., GAIL F. OUREN, HENRY J. TUPPER, WILLIE E. ANTHONY, JAMES H. VINCENT, individually and as constituting the COLORADO STATE BOARD OF SOCIAL SERVICES: and MELVIN POBANZ, individually and as Director of the EL PASO COUNTY DEPARTMENT OF PUBLIC WELFARE,

Petitioners.

v.

ASCENSION VIALPANDO for herself and her minor child, SABRINA VIALPANDO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

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2. Whether the decisions below in this case conflict with the decisions of this Court regarding (a) the weight to be given to administrative interpretations by the responsible federal agency and (b) the scope of the discretion of the secretary of an executive department.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals (App. 87-94) is reported in 475 F. 2d 731.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 22, 1973. (App. 87-94)

The petition for a writ of certiorari was filed on May 9, 1973, and was granted on November 5, 1973. This Court's jurisdiction rests on 28 USC §1254(1). On April 13, 1973, the Court of Appeals entered an order staying the issuance of its mandate until May 12, 1973, to allow time for appellants to file a petition for a writ of certiorari. The stay remains in effect pursuant to F.R. App. P. 41(b).

STATUTES INVOLVED

United States Code, Title 42:

"§601. Appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

§602 State plans for aid and services to needy families with children; contents; approval by secretary

(a) A State plan for aid and services to needy fam-

ilies with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; . . . (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community services aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency; and . . . (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—
(ii) in the case of earned income of a dependent child not included under clause (1), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination the first $30.00 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632(b) (2) and (3) of this title); . . .

• • •

(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have the opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals. . .

§1302. Rules and regulations

The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

REGULATIONS INVOLVED

The following parts of 45 CFR Section 233.20, as amended, are relevant to this case:

"§233.20 Need and amount of assistance.

(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

(1) *General.* Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way, except where otherwise specifically authorized by Federal statute.

(2) *Standards of assistance.* (i) Specify a statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment.

(ii) In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (*i.e.*, combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3) (viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards.

(iii) Provide that the standard will be uniformly applied throughout the State.

• • •

(3) *Income and resources; OAA, AFDC, AB, APTD, AABD.* (i) Specify the amount and types of real and personal property, including liquid assets, that may be reserved, *i.e.*, retained to meet the current and future needs while assistance is received on a continuing basis. In addition to the home, personal effects, automobile and income producing property allowed by the agency, the amount of real and personal property, including liquid assets, that can be reserved for each individual recipient shall not be in excess of two thousand dollars. Policies may allow reasonable proportions of income from businesses or farms to be used to increase capital assets, so that income may be increased.

• • •

(iv) Provide that, in determining the availability of income and resources, the following will not be included as income: (a) Income equal to expenses reasonably attributable to the earning of income:

• • •

(6) *Disregard of earned income; definition.* Provide that for purposes of disregarding earned income the agency policies will include: (i) A definition of 'earned income' in accordance with the provisions of subdivisions (iii) through (viii) of this subparagraph; and

(ii) Provision for disregarding earned income for the period during which it is earned, rather than when it is paid, in cases of lump-sum payment for services rendered over a period of more than 1 month.

(iii) The term 'earned income' encompasses income in cash or in kind earned by a needy individual through the receipt of wages, salary, commissions, or

profit from activities in which he is engaged as a self-employed individual or as an employee. Such earned income may be derived from his own employment, such as a business enterprise, or farming; or derived from wages or salary received as an employee. It includes earnings over a period of time for which settlement is made at one given time, as in the instance of sale of farm crops, livestock, or poultry. In considering income from farm operation, the option available for reporting under OASDI, namely the 'cash receipts and disbursements' method, *i.e.*, a record of actual gross, of expenses, and of net, is an individual determination and is acceptable also for public assistance.

(iv) With reference to commissions, wages, or salary, the term 'earned income' means the total amount, irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers.

(v) With respect to self-employment, the term 'earned income' means the total profit from business enterprise, farming, etc., resulting from a comparison of the gross income received with the 'business expenses,' *i.e.*, total cost of the production of the income. Personal expenses, such as income-tax payments, lunches, and transportation to and from work, are not classified as business expenses.

(vi) The definition shall exclude the following from 'earned income': Returns from capital invest-

ment with respect to which the individual is not himself actively engaged, as in a business (for example, under most circumstances, dividends and interest would be excluded from 'earned income'); benefits (not in the nature of wages, salary, or profit) accruing as compensation, or reward for service, or as compensation for lack of employment (for example, pensions and benefits, such as United Mine Workers' benefits or veterans' benefits).

(vii) With regard to the degree of activity, earned income is income produced as a result of the performance of services by a recipient; in other words, income which the individual earns by his own efforts, would be properly classified as earned income, such as management of capital investment in real estate. Conversely, for example, in the instance of capital investment wherein the individual carries no specific responsibility, such as where rental properties are in the hands of rental agencies and the check is forwarded to the recipient, the income would not be classified as earned income.

(viii) Reserves accumulated from earnings are given no different treatment than reserves accumulated from any other sources.

(7) *Disregard of earned income; method.* (i) Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of 'earned income,' and all work expenses personal and non-personal, will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment."

The following part of Section 4313.13 of the Colorado Division of Public Welfare Staff Manual, Volume IV, is relevant to this case:

"4313.13 EMPLOYMENT INCOME.

• • •

For employment expenses such as transportation, special clothing, union dues, special education or training costs, telephone, additional food or personal needs, etc., which are an obligation due to the employment, an allowance of $30 per month is made for such costs."

QUESTIONS PRESENTED

1. Whether, in the administration of the Aid to Families with Dependent Children (AFDC) program the use of a standardized statistically based work expense allowance, as described in Rule 4313.13 of the Colorado Division of Public Welfare Staff Manual, violates Title IV of the Social Security Act when read as a whole or whether such an allowance is a permissible method to be used to "take into consideration" any such work expenses and determine their reasonableness.

2. Whether the decisions below in this case conflict with the decisions of this Court regarding (a) the weight to be given to administrative interpretations by the responsible federal agency and (b) the scope of the discretion of the secretary of an executive department.

STATEMENT OF THE CASE

The petitioners, Con F. Shea, et al., are responsible for the administration of the public assistance and social services programs in Colorado. The respondents, Ascen-

sion Vialpando, et al., were, at various times, applicants and recipients under the Aid to Families with Dependent Children (AFDC) program in Colorado.

This is not a class action. (App. 51 and 88).

Eligibility or continued eligibility for AFDC benefits is, to a large degree, determined by the need of the applicant or recipient. The AFDC program is more fully described in *King v. Smith*, 392 U.S. 309 (1968), and *Rosado v. Wyman*, 397 U.S. 397 (1970).

In general, need is determined by comparing the applicant's or recipient's net income[1] to the state's standard of need.[2]

Under the Social Security Act, a state plan for Aid to Families with Dependent Children must, inter alia, "provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . as well as any expenses reasonably attributable to the earning of any such income. . ." 42 U.S.C. §602(a)(7).

Prior to July of 1970, the Colorado regulations governing the Aid to Families with Dependent Children program provided a work expense allowance which included, but was not limited to, the actual cost of transportation, within certain limits. This included "purchase, repair, or

[1] Briefly, the computational sequence is as follows:

Gross Income
Less work incentive ($30 + 1/3 of the balance)
Sub Total
Less mandatory payroll deductions
Sub Total
Less allowable work expenses
Net Income

[2] The states have the option of comparing net income to percentage of the standard of need if insufficient funds are appropriated to pay 100% of the standard of need. The concept of standard of need is more fully described in **Rosado v. Wyman, supra.**

upkeep of a vehicle, providing it is essential to retain employment and the plan therefore is approved by the county department." The policy was changed in May of 1970 to a maximum transportation work expense allowance of either $30 per month, if a car was needed to get to or from work, or the actual expenses of public transportation. In July of 1970, the Colorado work expense allowance regulation was changed so that it consisted of (1) mandatory payroll deductions, plus (2) child care expenses, plus (3) $30. The $30 figure was based upon a statistical analysis of a statewide survey of actual work expenses. (App. 40-41U)

The change in the state regulation in July of 1970 was considered to be consistent with the Social Security Act for several reasons. (These reasons are summarized and discussed more fully, with citations, in later sections of this brief). The change was approved by the United States Department of Health, Education, and Welfare (HEW). The method for taking work expenses into consideration and determining their reasonableness is not specified in either the Social Security Act or the federal regulations. The figure of $30 per month was based upon a statistical analysis of all actual work expenses of persons in the Aid to Families with Dependent Children program. (App. 40-41U) The Social Security Act, when read as a whole, makes many requirements which must be reconciled. The program must be statewide. It should be efficiently administered. Error in administration should be minimized. The state is to administer the program to provide assistance and services "as far as practicable" to eligible persons. In *Rosado v. Wyman, supra,* the court approved the use of standardized amounts in another subsection of 42 U.S.C. §602. The long-standing administra-

tive interpretation of HEW has been to permit the use of standardized work expense allowances for some items of work expenses.

Prior to and after July of 1970, Mrs. Vialpando had a 1968 Volkswagon. Prior to July of 1970, the county department allowed her a work expense allowance which included $47.30 per month for mileage and $63.81 for payments on the car.

The dispute in this case arose when the amended work expense allowance was applied to Mrs. Vialpando's case. Since the $30 statistically based standard allowance was less than the $47.30 in mileage plus $63.81 in car payments which she was previously allowed, her net income was increased above the standard of need and she was found to be ineligible for AFDC. The question of whether or not $30 is sufficient is not in question, the issue is whether or not the use of a standardized work expense allowance is permissible.

Mrs. Vialpando, and others, filed suit for injunctive and declaratory relief under 42 U.S.C. §1983 on or about July 27, 1970, in the United States District Court for the District of Colorado. Jurisdiction was asserted under 28 U.S.C. §§1343(3) and (4), 2201 and 2202. (App. 11-17)

The District Court decided the matter in favor of the plaintiff. (App. 42-49, 78-83) The Defendants appealed to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals decided in favor of Mrs. Vialpando (App. 87-94). The State and County parties petitioned for a writ of certiorari which was granted by this Court.

SUMMARY OF ARGUMENT

Colorado's statistically based standard work expense allowance is fully stated in Rule 4313.13 of the Colorado Division of Public Welfare Staff Manual. It complies with the requirements of 42 USC §602(a)(7) that the state "shall in determining need, *take into consideration* . . . any expenses reasonably attributable to the earning of any such income." [Emphasis added]

The statute does not specify a method for considering work expenses. The words "take into consideration" and 42 USC §1302 give the Secretary of the U.S. Department of Health, Education and Welfare, (hereinafter referred to as "HEW") discretion in determining what methods comply with the statute. HEW has approved not only the concept of a statistically based work expense allowance, but also Colorado's Rule 4313.13. These interpretations should be given great weight. The decision of the Court below should be reversed.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE CLEAR MEANING OF THE STATUTE INVOLVED.

A. *The Statute*

The language of the following statute governs the outcome of this case:

> "A state plan for aid and services to needy families with children must . . . provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children

. . . as well as any expenses reasonably attributable to the earning of any such income." 42 U.S.C. §602(a)(7).

B. *The Statutory Requirement to "take into consideration" Certain Work Expenses*

A time-tested and cardinal rule of statutory construction is that every statute must be read and understood as a whole. "Provided the interpretation is reasonable and not in conflict with legislative intent, effect and meaning must, if possible, be given to the entire statute and part and word thereof." 82 C.J.S. Statutes Section 364 (1953). See also *Ginsburg and Sons v. Popkin,* 285 U.S. 204 (1932). The Court of Appeals seemed to give entirely no effect to the words "take into consideration." In 42 U.S.C. §602(a)(7), the words "take into consideration" mean just that and no more. The statute could have said "deduct all work expenses from gross income" or some other specific requirement; however, it says "take into consideration." Accordingly, the decision of the court below is erroneous as a matter of law.

C. *The States have Considerable Latitude in Allocating Funds Available for Welfare Purposes*:

The States are only required to furnish financial assistance and rehabilitation and other services "as far as practicable." 42 U.S.C. §601.

Under federal law, financial eligibility and the determination of financial need is left to the states. 42 U.S.C. §602(a)(7) and 45 CFR §233.20. During the period relevant to this case Colorado made this determination in the AFDC program by funding the budgetary need. 119-9-5, C.R.S. 1963 (1969 Perm. Cum. Supp.) It is therefore appropriate for the state to have considerable discretion in

determining the method by which it will take work expenses into consideration.

The subsection in question, 42 U.S.C. §602(a)(7), requires that a state "take into consideration" certain work expenses and determine whether they are "reasonably attributable" to the earning of income. The statute does not prescribe a method for either taking work expenses into consideration or determination their reasonableness[3] This Court has recognized the need for allowing the states considerable latitude in allocating the limited funds available for welfare purposes. *King v. Smith,* supra, *Dandridge v. Williams,* 397 U.S. 471 (1970), and *Jefferson v. Hackney,* 406 U.S. 435 (1972).

In *Dandridge v. Williams,* supra, a system of maximum grants was upheld as being valid by this Court as a method of reconciling the demands of the needy citizens of a state with the resources available to meet those demands. The court quoted extensively from *King v. Smith,* supra.

"In *King v. Smith,* supra, we stressed the States' 'undisputed power,' under these provisions of the Social Security Act, to set the level of benefits and the standard of need.' . . . We described the AFDC enterprise as 'a scheme of cooperative federalism,' . . . and noted carefully that '[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of

[3] Nowhere in the federal law is it required that individual computations be made in each applicant's case to total all expenses. It is a procedure similar to the allowance of a $750.00 exemption for income tax purposes for each child. Certainly many, if not all, parents spend more than $750.00 per year to feed, clothe, educate and raise their children. The principle is well established and not unfair.

funds it devotes to the program.' . . . Congress was itself cognizant of the limitations on state resources from the very outset of the federal welfare program." *Dandridge,* at 478.

"The strong policy of the statute [Social Security Act] in favor of preserving family units does not prevent a State from sustaining as many families as it can, . . ." *Dandridge* at page 480. Colorado, then, in line with the opinion in *Dandridge,* has imposed a reasonable flat allowance on the employment expenses of its working AFDC recipients, based upon a statistical study of all work expenses claimed by recipients. If a State can set its own standard of need and pay any percentage of that standard, it can also impose a limit upon the component variables of the grant.

In applying the *Dandridge* concept to this case, it should be noted that the appropriation that the Colorado Legislature can make for welfare in general and for the AFDC program in particular is limited. The expenditure of these funds must be divided between administration and actual benefits to recipients. If a disproportionate amount of money is spent for administration, either the assistance or services aspects of the various categorical programs will suffer. While the $30 average work expense allowance, when multiplied by the number of working recipients, would enable the defendant and the state legislature to approximate the amount of work expenses in the AFDC program, this would in no way represent the amount of additional administrative cost which would be required if individual itemized consideration of each individual's work expenses were required. This additional administrative expense would cause the diversion of funds

from the benefit portion of the Colorado welfare programs. See *Jefferson v. Hackney,* supra.

This Court has stated that, "It is true that each of the [categorical assistance] programs is intended to assist the needy, but it does not follow that there is only one constitutionally permissible way for the State to approach this important goal." *Jefferson v. Hackney,* supra.

D. *This Court has Previously Approved of the Use of Statistical Averaging in Another Subsection of the Statute in Question.*

This Court previously allowed averaging in welfare computations in *Rosado v. Wyman,* supra, where statistical averaging was used by New York to develop a flat grant. The purpose of the flat grant was to promote administrative efficiency. This Court did prohibit the use of a flat grant to reduce the standard of need.

HEW advised Colorado on the basis of *Rosado,* that statistical averaging of employment expenses was similarly permissible. Colorado, in the process of averaging employment expenses, took the entire array of employment expenses into consideration. Colorado's statistically based work expense rule does not violate federal law, but, rather is a reasonable interpretation and application of it.

The use of statewide standard of need permitted by this Court in *Rosado v. Wyman,* supra, is not legally distinguishable from the use of a standard work expense allowance based upon a statistical analysis of all actual work expenses.

II. THIS COURT HAS HELD ON MANY OCCASIONS THAT THE INTERPRETATION BY A FEDERAL AGENCY OF THE STATUTES THAT IT ADMIN-

ISTERS IS ENTITLED TO GREAT WEIGHT. THE COURT BELOW HAS NOT GIVEN DUE CONSIDERATION TO THE INTERPRETATION BY THE U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE OF THE SOCIAL SECURITY ACT AND THE REGULATIONS PROMULGATED PURSUANT TO IT.

A. *Introduction.*

The U.S. Department of Health, Education and Welfare which administers the AFDC program has interpreted 42 U.S.C. §602(a)(7) to allow Colorado to average employment expenses because the use of such a method contributes to the efficient and fair administration of the AFDC program.

Under ideal conditions, the administration of the AFDC program is a monumental and most significant undertaking. Colorado is sensitive to the need to be careful in the determination of eligibility for each applicant. It is essential that Colorado be allowed to determine eligibility correctly without subjective judgments. Clearly defined criteria for all eligibility requirements are essential. The State must provide standards and guidelines to the county departments of social services for use in determining eligibility.

If each item of work expense is considered separately in each case in each county, the program will not be uniform on a statewide basis. If the facts presented by Mrs. Vialpando were presented to another eligibility technician in the same county or in another county, a decision could easily have been reached that the cost of purchasing an automobile was either unnecessary if local employment were sought, or merely a personal convenience and

not an "expense reasonably attributable to the earning of . . . income."

The Department of Health, Education and Welfare must audit the states to ascertain that they have complied with the requirements of the AFDC law. This includes review of individual case files and review of how the states determine eligibility. The states have a substantial interest in being permitted to use a fixed average amount, rathen than being vulnerable to the subjective judgment of an HEW auditor.

A flat work expense allowance also allows the applicant or recipient to plan ahead, knowing what amount will be allowed for employment expenses. He or she will then know in advance, with a fair degree of certainty, the amount of the AFDC grant for each month.

B. *This Court has held that the Agency Interpretation of the Social Security Act is Entitled to Great Weight.*

Congress and this Court have firmly established that the Secretary of a federal executive agency has considerable discretion and statutory interpretations by such agencies are entitled to great weight. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman,* 380 U.S. 1 (1965), *Lewis v. Martin,* 397 U.S. 552, 559 (1970), *United States v. City of Chicago,* 400 U.S. 8 (1970).

The Secretary of the United States Department of Health, Education, and Welfare (referred to hereafter as the "Secretary") has broad discretion. 42 U.S.C. §1302.

C. *The Secretary Must Harmonize Several Provisions of the Social Security Act in Determining Whether or Not to Approve a State Plan which Utilizes a Standardized Work Expense Allowance.*

The Social Security Act must be read as a whole. See *Ginsburg and Sons Inc. v. Popkin*, 285 U.S. 204 (1932). In this case, the Social Security Act creates several requirements which must be reconciled by the Secretary or his designee. *Udall v. Tallman, supra*, at 9.

1. *The Requirement for a Statewide Program*:

The Secretary must ensure that an AFDC state plan will provide that the program will be in effect in all political subdivisions of the state. 42 U.S.C. §602(a)(1). This requirement carries with it a mandate for uniformity throughout the state which is not possible with subjective item by item determination of whether or not a particular expenditure by an individual was reasonably attributable to the earning of income.

2. *The Requirement for Efficient Administration*:

Under 42 U.S.C. §602(a)(5) a state plan must provide for "such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan . . ." The use of a standardized work expense allowance reduces administrative costs and errors[4] in determining eligibility.

[4] New federal regulations have been published which will impose financial penalties upon the states for errors in eligibility determinations. 38 Fed. Reg. 8743 (1973). The new regulations impose extremely strict requirements for "zero error." A standardized work expense allowance would be necessary if errors are to be avoided.

3. *The Requirement for Prompt Assistance:*

Assistance must be provided with "reasonable promptness to all eligible individuals." 42 U.S.C. §602 (a)(10). The delays inherent in item by item consideration of work expenses can be avoided by using a standardized allowance.

D. *The Secretary's Interpretation of* 42 USC §602 (a)(7) *Was Stated In The Memorandum of The United States as Amicus Curiae In This Case*

The Memorandum for the United States as Amicus Curiae supporting the Petition for the Writ of Certiorari in this case stated on pp. 6-8:

> "Moreover, as Blackstone noted long ago (1 Blackstone, Commentaries 59 (Philadelphia, 1866), '[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made. . . .' The provisions in Section 402(a)(7) relating to income and work expenses were enacted separately. The original statutory requirement that 'income' be taken into consideration was designed to ensure that the respective incomes of all members of the family be considered in assessing the family's need; the clear 'will of the legislator' was that the particular family's actual income was to be computed. After several years' experience with AFDC programs, Congress then amended the statute (Section 106 of P.L. 87-543, 76 Stat. 188) to require that work expenses be considered in determining need; this was done in recognition of the fact that families with working members incur not only the family living expenses normally included within the state's standard of need but additional work-related expenses as well.

Congress was aware that work expenses were simply additional items of living expense incurred by virtue of employment: as the Senate Finance Committee noted in recommending passage of the work expenses amendment, 'if these work expenses are not considered in determining need, they have the effect of . . . reducing the amount available for food, clothing, and shelter.' S. Rep. No. 1589, 87th Cong., 2d Sess., at 18. It has therefore been the judgment of the Secretary that work expenses may be taken into consideration by the states in the same manner as other living expenses, *i.e.*, 'on the basis of statistical averages.' *Rosado v. Wyman*, 397 U.S. 397, 419.

This construction of the statute satisfies both the specific legislative purpose of ensuring consideration of the special needs of families with working members and the more general objective of efficient administration. And it is, of course, a long-standing principle of statutory interpretation that 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.' *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381.

In rejecting the Secretary's construction, the courts below stressed that the state requires 'any' work expenses to be taken into consideration and that the report of the Senate Finance Committee indicated that such expenses were to be taken 'fully into account.' We do not believe that the words 'any' and 'fully' support the conclusion of the courts below. The Secretary does not construe the statute as permitting an arbitrary work expense allowance; under

the Secretary's construction, to be valid, an allowance must be based on a statistically determined average. If the full range of reasonably foreseeable work expenses is included in the statistical base, the allowance so determined meets all legislative objectives reasonably implicit in the requirement that "any' expense be taken into consideration; and that the legislative history relied upon by respondents shows nothing more than a congressional intent that a state choosing to use a standard work expense allowance must consider all likely work expenses, *i.e.*, 'take these expenses fully into account' (S. Rep. No. 1589 supra at 18), in establishing that allowance."

E. *The Secretary in Harmonizing the Foregoing Provisions has Consistently Approved the Use of Standardized Work Expense Allowances Since* 1957.

State Letter 291, dated March 11, 1957, was sent "TO STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS," by the Social Security Administration of HEW. It transmitted various new pages for the *Handbook of Public Assistance Administration* (hereafter referred to as the "Handbook"), including Section 3140 "Specific Applications — Income and Resources 1, Employment Expenses." This regulation permitted a flat work expense allowance for food, clothes, and personal incidentals. (App. 3).

On July 25, 1962, 42 U.S.C. §602(a)(7) was amended by Section 106 (b) of Public Law 87-543 to provide for taking work expenses into consideration.

On April 22, 1964, the *Handbook of Public Assistance Administration* was amended. The amended *Handbook* reaffirmed the use of standardized work expense allow-

ances for food, clothing, and personal incidentals. (App. 4-6).

On July 17, 1968, with the approval of Secretary Wilbur J. Cohen, Interim Policy Statement No. 4 was published. (33 Fed. Reg. 10230) (1968). It required the disregard of income equal to expenses reasonably attributable to the earning of income. It replaced Section 3140 of the *Handbook*. However, the *Handbook* provisions are still used to interpret the federal regulations and the Social Security Act.

The new regulations reflecting the comments received on Interim Policy No. 4 (33 Fed. Reg. 10230) (1968) were published on January 29, 1969 (34 Fed. Reg. 1394) (1969).

On September 26, 1969 HEW sent a letter "To State Agencies Administering Approved Public Assistance Plans." This letter approved of standardized work expense allowances and provided tables for applying such allowances. (App. 7-10).

In 1970, HEW approved Colorado's $30 statistically based standard work expense allowance, which became effective in July of 1970. (App. 53, 69-73).[8]

The Brief of the United States as Amicus Curiae filed in *Adams v. Parham*, Civil Action No. 16041 (N.D.

[8] In Colorado, new rules or amendments to existing rules, are referred to by Transmittal Letter (T.L.) numbers.

Using the T.L. numbers shown on the face of a series of amendments to the rules, one can determine the sequence in which the rules were adopted by the State Board of Social Services. The Transmittal Letter is a separate document which transmits the new rule material to the County Welfare Departments and other interested persons. (App. 53-56).

Often, a rule is also a state plan provision. Colorado's statistically based work expense allowance was adopted as Rule 4313.13 by the State Board of Social Services. The particular text of the rule which is involved in this case was accompanied by T.L. 1033-A. (App. 70-72). This rule was approved as a state plan amendment by HEW. (App. 69-70).

Ga. filed April 14, 1972) described the Secretary's interpretation of the Social Security Act which permitted the use of standardized work expense allowances. (This brief is printed as Appendix "E" to the State of California's brief as amicus curiae in support of Colorado's petition for certiorari in the instant case.)

The Secretary or his authorized representatives has approved some form of mandatory standard work expense allowance in 35 states. See the Memorandum for the United States as Amicus Curiae in the instant case, pp. 5 and 9.

This Court should reinforce its decisions which emphasize that the long-standing interpretations of the Social Security Act by the officers charged with its administration are to be given great weight and deference. *Udall v. Tallman*, supra, *Lewis v. Martin*, supra., and *U.S. v. City of Chicago*, supra.

III. COLORADO WAS JUSTIFIED IN RELYING UPON THE INTERPRETATIONS OF THE SOCIAL SECURITY ACT AND THE IMPLEMENTING REGULATIONS MADE BY THE U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE WHICH PERMIT THE USE OF STANDARDIZED WORK EXPENSE ALLOWANCES.

A. *Colorado Complied With the Relevant Regulations Published in the Federal Register.*

Regulations have been published in the Federal Register and codified in the Code of Federal Regulations which implement 42 USC §602(a)(7). 45 CFR §233.20.

The first of the relevant subparagraphs of this regulation requires that state plans in the AFDC program:

> "Provide that, in determining the availability of income and resources, the following will not be included as income: (a) Income equal to expenses reasonably attributable to the earning of income;" 45 CFR §233.20(a)(3)(iv).

The Colorado statistically based work expense allowance is a permissible method for determining those work expenses which are "reasonably attributable to the earning of income." An amount of income equal to this $30 allowance is not included as income in determining budgetary need.

Another way of approaching this problem is to start with the assumption that the work expense allowance is intended to encourage recipients to become self-sufficient wage earners. If the amount of work expenses is constantly increased, an individual can remain permanently eligible for assistance. There is a built-in "incentive to consume" if some definition is not given to the words "reasonably attributable." A standard allowance accomplishes this.

The next relevant subparagraph concerns the disregard of earned income and provides that:

> "With reference to commissions, wages, or salary, the term 'earned income' means the total amount, irrespective of personal expenses, such as income tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers." 45 CFR 233.20(a)(6)(iv).

These specific types of expense are either included in the statistically based work expense allowance in Colorado

or are separately disregarded. Accordingly, this regulation has been complied with.

The last relevant portion of the regulations published in the Code of Federal Regulations concerns the sequence of the arithmetic involved in determining the amount of income that a person receives. A State Plan must:

> "Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of 'earned income,' and all work expenses personal and non-personal will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment." 45 CFR §233.20(a)(7).

Since this is merely a procedural regulation, it has omitted the key words of the statute which limit the disregard of income to that which is "reasonably attributable to the earning of any such income." Accordingly, the word "all," as used in the quoted regulation, is qualified by the statutory terms, and the Colorado statistically based allowance provides the means for disregarding income in full compliance with the statute and regulations.

B. *Other Regulations Promulgated by HEW which were not Published in the Federal Register Were Properly Relied Upon by Colorado.*

1. *Introduction.*

An interpretation of the statute involved and the application of the foregoing regulations, however, were not the only basis upon which Colorado based its conclusion, that a statistically based work expense allowance would fully comply with federal law.

In administering the Colorado AFDC State Plan, the state complies with not only the specific requirements stipulated in the pertinent title of the Social Security Act and the regulations published in the Federal Register, but also, the "other applicable official issuances of the Department [of HEW]." 45 CFR §201.2. "After approval of the original plan by the [Social and Rehabilitation] Service, all relevant changes, required by new statutes, rules, regulations, *interpretations,* and court decisions, are required to be submitted currently so that the service may determine whether the plan continues to meet federal requirements and policies." [emphasis added] 45 CFR §201.3.

Colorado has received various communications from HEW which appear to be "official issuances" and "interpretations." These communications have been entitled "State Letters" and "Assistance Payments Memoranda." They also appear to be "rules" within the meaning of 5 U.S.C. §551(4). As "rules" these communications could be considered as amendments to the rules published in the Federal Register. In addition, HEW has specifically approved Colorado's statistically based work expense allowance as a state plan amendment (App. 69-72 and See n.5 supra).

2. *The "Handbook of Public Assistance Administration," "State Letters" and "Assistance Payments Regional Memoranda" Need Not be Published in the Federal Register.*[6]

A circular issued by the U.S. Department of Housing and Urban Development under the agency's rule-making power and intended by the agency to be mandatory was found by this Court to be binding upon a local housing

[6] The arguments based upon the applicablity of the Administrative Procedure Act were not presented to the court below.

authority. *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969).

In a similar case involving a HUD Circular, the *Thorpe* case was relied upon and it was held that the exemption under 5 U.S.C. §553(a)(2) was applicable to the Circulars. *Housing Authority of the City of Omaha, Nebraska v. United States Housing Authority*, 468 F. 2d 1, 10 (8th Cir. 1972). An unpublished case in this area, *Worrell, et al., v. Sterrett, et al.*, CCH Pov. L.R. ¶10, 575 (N.D. Ind. 1969), held that a provision in HEW's Handbook of Public Assistance Administration which had not been published in the Federal Register was binding upon the State.

The "Handbook of Public Assistance Administration," "State Letters" and an "Assistance Payments Regional Memorandum" were sent by HEW to the various states. These have been discussed above and reprinted in the Appendix to this brief (App. 3-10, 84-86). They permit the use of a standardized work expense allowance. These letters were published under HEW's rule-making power but were not published in the Federal Register.[7] However, the rule-making procedural re-

[7] Agencies of the federal government are required to publish in the Federal Register only those descriptions, statements, and rules described in 5 U.S.C. §552 which are "for the guidance of the public." The Attorney General of the United States was of the opinion that "The term 'public' would not seem to embrace states. For example, the Federal Security Agency sends interpretive guides to states to assist them in complying with the requirements of the unemployment compensation provisions of the Social Security laws. Such guides need not be published since they are not for the use of the "public" but only for the state governments. **Attorney General's Manual on the Administrative Procedure Act**, p. 22, (1947).

In the AFDC program, individual recipients do not file applications with the U.S. Department of Health, Education and Welfare under the Social Security Act and its implementing regulations. Further action is required by the state before material in a State Letter or federal regulation can affect the public. Accordingly, State Letters and Assistance Payments Regional Memoranda need not be published in the Federal Register before a state can rely upon their contents.

quirements of 5 U.S.C. §553 (formerly 5 U.S.C. §1003) do not apply to "a matter relating to public . . . grants, benefits or contracts." 5 U.S.C. §553(a)(2). *Rodriguez v. Swank*, 318 F. Supp. 289 (N.D. Ill. E.D. 1970), aff'd. 403 US 901 (1971).

Title IV of the Social Security Act is captioned "Grants to States For Aid and Services to Needy Families with Children and for Child Welfare Services." Since a grant program is involved, "State Letters" do not have to be published in the Federal Register.

The regulations, State Letters, Assistance Payments Regional Memoranda, and Brief of the United States as Amicus Curiae in *Adams v. Parham* indicate that the Secretary has exercised his broad discretion and implemented, or in the alternative, interpreted, the Social Security Act to permit the use of standardized work expense allowances.

C. *Colorado's Work Expense Allowance was Approved by HEW.*

The state regulation in question, Rule 4313.13 of the Colorado Division of Public Welfare Staff Manual, is part of Colorado's State Plan. It was approved by the U.S. Department of Health, Education and Welfare pursuant to 45 CFR §201.3 (App. 69-72 and see n.5 supra).

IV. THE OPINIONS OF THE COURTS BELOW SERIOUSLY HINDER THE EFFECTIVE ADMINISTRATION OF THE SOCIAL SECURITY ACT.

Apart from the lower court decision in this case, a considerable body of lower court case law has developed in related cases. Some of these courts have ruled in favor

of standardized work expense allowances.[8] Others have not.[9] The overall effect of these decisions is to seriously hinder the effective administration of the Social Security Act.

[8] The California Court of Appeal for the Third Appellate District on November 13, 1972, reversed the trial courts' order granting a preliminary injunction against the enforcement of the provisions of Sec. 11451.6 of the Welfare and Institutions Code. The cited statute provided for a fifty dollar per month work expense allowance, plus reasonable and necessary costs of child care. On January 17, 1973, the California Supreme Court granted hearing. **Conover v. Hall, 104 Cal. Reptr. 77 (Cal. App. 1972)**, hearing granted January 17, 1973.

In the form of dicta, a three judge federal district court approved New Jersey's fifty dollar per month work expense allowance and said that "if a state may use statistical averages to determine the various components of need, it may also do so to compute business expenses." The issue was not presented to the U.S. Supreme Court. **Engleman v. Amos**, 333 F. Supp. 1109 (D.N.J. 1970), modified on other grounds. 404 U.S. 23 (1971).

The U.S. District Court for the Eastern District of Michigan approved a settlement approved by the U.S. Department of Health Education and Welfare which included a $40.00 maximum work expense allowance. **Michigan Welfare Ri[illegible] Organization v. Houston**, Civil Action No. 34529 (E.D. Mich. filed April 30, 1971).

[9] In **Adams v. Parham**, supra, a single District Court judge held that a $35 per month flat work expense allowance was invalid. The Court ruled upon the District Court decision in the present case and upon **Williford v. Laupheimer**, infra.

In **Campagnuolo v. White**, Civil Action 13968 (D. Conn. filed June 22, 1972) a single federal district judge held that a $60 per month flat work expense allowance for full time employment and a $40 per month allowance for the expenses resulting from part time employment were invalid if recipients were not allowed to prove and deduct actual expenses in excess of the flat amounts. The Second Circuit has held that the state could not limit the types of work expenses to mandatory payroll deductions and child care expenses. **Connecticut State Department of Public Welfare v. Department of Health, Education and Welfare**, 448 F. 2d 209 (2d Cir. 1971).

County of Alameda v. California, 97 Cal. Reptr. 385, 5 Cal. 3d 730, 488 P.2d 953, (1971), Appeal Dismissed 406 U.S. 913 (1972), involved state work expense allowance regulations which provided for standard deductions ranging from $6 to $25 per month. The California Supreme Court invalidated the regulation. The frequently cited case of **Williford v. Laupheimer**, 311 F. Supp. 720 (E.D. Pa. 1969) involved a maximum, rather than a statistically based flat grant. Accordingly it is distinguishable.

New federal regulations have been published which will impose financial penalties upon the states for errors in eligibility determinations. 38 Fed. Reg. 8743 (1973). The new regulations impose extremely strict requirements for "zero error." A standardized work expense allowance would be necessary if errors are to be avoided.

In **Anderson v. Graham**, Civil Action No. CV 72-L-176 (D. Nebraska decided April 4, 1973) the Court invalidated the Nebraska $25 standard work expense allowance. This case is now pending before the United States Court of Appeals for the Eighth Circuit.

The fact that issues in this case or similar issues have been presented to a substantial number of courts with varying results indicates the importance of the questions and the difficulty which state directors of public welfare have in determining what is permissible under the Social Security Act. The Circuit Court opinion in this case can be interpreted to mean that the states cannot rely upon instructions and interpretations from HEW.

V. CONCLUSION

The Court of Appeals' decision is in conflict with applicable decisions of this Court. The states are constantly faced with the question whether to follow instructions from HEW (and risk being sued by recipients) or not following such instructions (and risk losing federal funds).[10] This Court has been rather uniform in upholding instructions from the responsible federal agency in the latter context. In this case, this Court is being asked to resolve the substantial federal question of whether welfare recipients can successfully sue a state when the state is acting within its own broad discretion and is using a method approved by HEW to comply with the Social Security Act.

In view of the foregoing, the petitioners submit that the Court of Appeals and the District Court misconstrued, misapplied, or misconceived the applicable decisions of this Court and, in effect, ignored the Secretary's

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[10] Many federal agencies administer grant programs utilizing "circulars", "state letters", "policy and procedure memoranda and other similarly designated types of communications which appear to be "rules" under 5 U.S.C. §551(4). The Court's decision in this case can be of considerable assistance to state and local agencies in evaluating the legal effect of such documents.

interpretation and refused to recognize the Secretary's discretionary powers. Accordingly, the decision of the Court below should be reversed.

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